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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 667.

WESLEY W. WEST, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

No. 668.

J. MARION WEST, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

No. 669.

Estate of J. M. WEST, Deceased,
JAMES M. WEST, JR., et al., Executors, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

No. 670.

JESSIE GERTRUDE WEST, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION OF REHEARING UPON DENIAL OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RANDOLPH E. PAUL,
J. ARTHUR PLATT,
JAMES H. YEATMAN,
Counsel for the Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION OF REHEARING UPON DENIAL OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioners, Wesley W. West, J. Marion West, Estate of J. M. West, Deceased, James M. West, Jr., et al., Executors, and Jessie Gertrude West, pray that this Court rehear and reconsider its denial of the petitioners' petition

for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit in the above entitled consolidated cases. The order denying the granting of the petition was promulgated on January 28, 1946.

The history of the case, the questions presented, the statute and law involved, the specification of errors and the reasons for granting the writ are all set forth in the petition for certiorari and brief in support thereof, to which reference is made, and will not be repeated here.

Grounds for Granting the Petition.

This petition for rehearing of the denial of the petitioners' petition for a writ of certiorari is based upon the conflict in basic principles between this Court's decision in *Kirby Petroleum Co.* v. *Commissioner*[1] and *Commissioner* v. *Crawford*[2] and the decision of the Circuit Court of Appeals for the Fifth Circuit in the above entitled cases. That the application of these basic principles is properly considered a question of law is apparent from the decision in the *Kirby* and *Crawford* cases.

This Court in its decision in the *Kirby* and *Crawford* cases has again emphasized that, "The test of the right to depletion is whether the taxpayer has a capital investment in the oil in place which is necessarily reduced as the oil is extracted," and that economic interest means not title but "the possibility of profit from that economic interest dependent solely upon the extraction and sale of *the oil.*"[3] (Emphasis supplied). "The oil" from which the possibility of profit arises, the extraction of which reduces a taxpayer's capital investment, is the oil which is necessary

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[1] U. S. , decided January 28, 1946, found in Vol. IV, C.C.H. Standard Federal Tax Reports, par. 9149.

[2] U. S. , decided January 28, 1946, found in Vol. IV, C.C.H. Standard Federal Tax Reports, par. 9149.

[3] Opinion of this Court in *Kirby Petroleum* v. *Commissioner, supra.*

for the payment of royalties as is made clear in footnote 6 of this Court's decision. If a taxpayer has retained no interest in oil other than the oil necessary for the payment of royalties, he has no depletable interest in the central reservoir of oil other than the amount of his royalty oil.

In the present case the taxpayers retained no interest in the property conveyed except their 3/8 interest in the minerals, and yet under the decision of the Circuit Court of Appeals they are considered as having a depletable interest in some portion of the 5/8 interest irrevocably conveyed to Humble, a depletion allowance having been necessarily permitted upon the cash received by the taxpayers in payment for the 5/8 interest conveyed to Humble if the transaction is treated as a lease of the minerals.

The Circuit Court's decision is not in accord with the test laid down by this Court that a taxpayer, to be entitled to a depletion allowance, must have a capital investment which is being depleted by production. As oil is produced, the petitioners obtain their full 3/8 interest in each barrel. The production of Humble's 5/8 interest depletes no interest of the petitioners. The failure to treat the transaction as an outright sale of 5/8 of the minerals results in giving the petitioners a depletion allowance upon the cash payment which is not attributable to any economic interest retained by them. On the other hand the decision of the Circuit Court does not give the petitioners the benefit of the capital gain rate which is applicable to a transaction in which a taxpayer has stripped himself of all economic interest.

This Court pointed out in the *Kirby* case that a lessor's possibility of a return of capital depends upon oil production and ends with the exhaustion of the supply. The petitioners' possibility of return of their capital investment in the 5/8 interest does not so depend or end. Any return of capital to these petitioners was ended definitely and for all time when the conveyance was made. They have given up forever any interest in the 5/8 interest irrespective of pro-

duction. Continued production or an indefinite ceasing of production has no effect upon the petitioners' capital investment in the 5/8 interest; it is neither returned by the former nor withheld by the latter. As this Court has reiterated in the *Kirby* case, where there is an "absolute sale," the seller receives a "sale price" and not ordinary income upon which is allowed the depletion deduction. There is an absolute sale when the former owner transfers property without retaining any interest in the property conveyed, here a 5/8 mineral interest.

CONCLUSION.

For the foregoing reasons it is urged that a rehearing be granted and the order denying the petitioners' petition for a writ of certiorari be reconsidered.

The undersigned, the counsel of record for the petitioners, certify that this petition for a rehearing is presented in good faith and not for purposes of delay.

Respectfully submitted,

RANDOLPH E. PAUL,
J. ARTHUR PLATT,
JAMES H. YEATMAN,
Counsel for the Petitioners.

IN THE

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ESTATE OF J. M. WEST, DECEASED,
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v.

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JESSIE GERTRUDE WEST, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

SECOND PETITION OF REHEARING UPON DENIAL OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. ARTHUR PLATT,
JAMES H. YEATMAN,
Counsel for the Petitioners

ALPHA LAW BRIEF CO., HOUSTON, TEXAS

IN THE

Supreme Court of the United States

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WESLEY W. WEST, *Petitioner,*

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SECOND PETITION OF REHEARING UPON DENIAL OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Asssociate Justices of the Supreme Court of the United States:

The Petitioners, Wesley W. West, J. Marion West, Estate of J. M. West, Deceased, James M. West, Jr., et. al., Execu-

tors, and Jessie Gertrude West, pray that this Court rehear and reconsider its denial of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit in the above entitled consolidated cases. The order denying the granting of the petition was promulgated on January 28, 1946. A petition for rehearing was filed February 21, 1946 and denied February 25, 1946.

The history of the case, the questions presented, the statute and law involved, the specification of errors and the reasons for granting the writ are all set forth in the petition for certiorari and brief in support thereof, and in the first petition of rehearing, to which reference is made, and will not be repeated here.

Grounds for Granting the Petition

The Commissioner in his Supplemental Memorandum in BURTON-SUTTON OIL COMPANY, INC. v. COMMISSIONER OF INTERNAL REVENUE[1] urging the granting of a petition for certiorari in that case, states that if an assignment be considered as effectuating a sale of oil in place by the assignee, the decision of the Circuit Court of Appeals is correct. This decision denies to the assignee the right to exclude from its gross income the net profits payments due its transferror's assignor. If the case turns upon this point and if it is held that the assignee may not exclude the net profits payments to the assignor (from which it follows that the assignor has retained no depletable interest[2]) the differentiation between

[1] No. 361 in this Court, p. 5, certiorari granted February 11, 1946.

[2] Memorandum for the Respondent in **Burton-Sutton Oil Company, Inc., v. Commissioner of Internal Revenue,** No. 361 in this Court, p. 8.

a lease and an assignment can only be the reversionary interest retained by a lessor.[3] This basic point of distinction is also the point of distinction in the very closely related question whether a transaction is a sale or a lease involved in the above entitled cases. The above entitled cases should be considered along with the BURTON-SUTTON OIL COMPANY case since the same underlying legal theory may govern both.

If it is ultimately determined in the BURTON-SUTTON OIL COMPANY case that an assignee is not entitled to exclude the net profits payments from gross income, it can only be on the ground that the payments arise from an assignment, which amounts to a sale of oil in place[4], rather than a lease. In other words, by the assignment by which he retains only an interest in net profits, the assignor has retained no economic interest in the oil in place but has made an outright transfer. The only reasoning upon which an outright transfer can be grounded is that the assignor has not retained that right of reversion which is his continuing economic interest in oil in place which is being depleted by production. The Commissioner emphasizes[5] that it may be there was no true assignment (sale of oil in place) in the BURTON-SUTTON OIL COMPANY case because a right of reversion for failure to develop was contractually granted the assignor. This fact, in the Commissioner's view, gives the purported assignment the characteristics of a lease. We agree. In the case of the present petitioners no such reversionary interest was contractually or

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[3] Supplemental Memorandum for the Respondent in **Burton-Sutton Oil Company, Inc., v. Commissioner of Internal Revenue, supra**, p. 5, footnote 2. The Commissioner is in error when he states that the right of reversion is of only theoretical importance. To oil operators and owners this right is of the greatest practical consequence.

[4] As in **Helvering v. Elbe Oil Land Co.**, 303 U.S. 372.

[5] Supplemental Memorandum, supra, p. 6.

otherwise retained in the minerals conveyed. The transaction accordingly lacked the outstanding characteristic of a lease. The same basic reasoning governs both the BURTON-SUTTON OIL COMPANY case and the above styled cases.

The Commissioner gives as a reason for granting the petition for a writ of certiorari in the BURTON-SUTTON OIL COMPANY case the importance of the issue in the administration of the revenue.[6] The issue in the above entitled cases is even more important. The custom of selling land with the retention of a royalty interest is much more widespread in oil producing areas than is the leasing or assigning of leases with the retention of an interest in net profits, either with or without the additional retention of an oil royalty. As previously emphasized, the decision of the Circuit Court and its varying interpretation by revenue agents have produced among sellers of oil land great confusion and uncertainty in respect to their tax liability and will unquestionably result in a large amount of litigation and controversy.

It is respectfully urged that a writ of certiorari be issued in the above entitled cases.

The undersigned counsel of record certify that this second petition for rehearing is presented in good faith and not for purposes of delay, all tax and interest asserted having been paid.

J. ARTHUR PLATT,
JAMES H. YEATMAN,
Counsel for the Petitioners

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[6] Supplemental Memorandum, supra, p. 1.

Murphy J

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No. 670

JESSIE GERTRUDE WEST, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

I. Request for Permission to File a Third Petition for Rehearing Upon Denial of a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

II. Motion for Rehearing Upon Denial of a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

J. ARTHUR PLATT,
JAMES H. YEATMAN,
Counsel for the Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. Request for Permission to File a Third Petition for Rehearing Upon Denial of a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the Petitioners, Wesley W. West, J. Marion West, Estate of J. M. West, Deceased, James M. West, Jr., et al., Executors, and Jessie Gertrude West, by their counsel

of record and request that this honorable Court grant its permission to the filing of the motion for rehearing set forth below.

II. Motion for Rehearing Upon Denial of a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

The Petitioners, Wesley W. West, J. Marion West, Estate of J. M. West, Deceased, James M. West, Jr., et al., Executors, and Jessie Gertrude West, pray that this Court rehear and reconsider its denial of the Petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit in the above consolidated cases. The order denying the granting of the petition was promulgated on January 28, 1946. A petition for rehearing was filed February 21, 1946 and denied February 25, 1946. A second motion for rehearing was filed upon March 18, 1946 and was denied by an order dated May 6, 1946.

Grounds for Granting the Petition.

This Court should reconsider its decision and grant certiorari because the effect of the decision of the Circuit Court of Appeals for the Fifth Circuit is to subject capital to a non-proportional tax in violation of the XVI Amendment to the Constitution of the United States and in violation of the principles enunciated in *Eisner* v. *Macomber,* 252 U. S. 189 (1919).

The Circuit Court of Appeals has held that the purchase price received by a seller of land, who retains a royalty, is taxable as ordinary income subject only to the depletion deduction of 27½ percent. This result is reached by analogizing a sale with a royalty retained to a lease of oil lands upon which a cash bonus is paid. The depletion deduction, however, has no reference to the cost of the property. The seller has completely disposed of the property transferred and has no assurance that he will recover his cost.

To illustrate, if the cost of the lands here conveyed by the Petitioners had been $8,000,000 and they had received an $8,000,000 purchase price upon the conveyance, they would have realized no gain. Yet under the Circuit Court's decision they would be taxed upon $5,800,000 ($8,000,000 minus 27½ percent of $8,000,000) as ordinary income. If within a year of the sale the oil ran out, the taxpayers would never recover either their unrecovered investment of $5,800,000 or their land. This fact differentiates the seller's situation from the leasing arrangement where, if the oil ran out, the lessor would recover his property. A lessor would not, therefore, dispose of his property without recovering his cost and is not taxed upon capital when his lease bonus is taxed as ordinary income. A seller, however, under the principles laid down in this case is taxed upon his capital since he is not allowed first to recover his cost before the profit, if any, is subjected to tax. This result is in violation of the XVI Amendment and the revenue law should not be so interpreted.

It is respectfully urged that a writ of certiorari be issued in the above entitled cases.

The undersigned counsel of record certify that this third petition for rehearing is presented in good faith and not for purposes of delay, all tax and interest asserted having been paid.

J. Arthur Platt,
James H. Yeatman,
Counsel for the Petitioners.